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DIVISION II

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STATE OF WASHINGTON
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NO. 38971-1-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ERICA N. GOOKIN,

Appellant,

PM 9-14-07

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Gary R. Tabor, Judge
Cause No. 08-1-01796-0

BRIEF OF APPELLANT

THOMAS E. DOYLE, WSBA NO. 10634
Attorney for Appellant

P.O. Box 510
Hansville, WA 98340-0510
(360) 638-2106

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in failing to suppress evidence where the warrantless search of the vehicle was unconstitutional under Arizona v. Gant.
02. In denying Gookin's motion to suppress evidence, the trial court erred in entering Findings of Fact 8, 13 and 19, as fully set forth herein at page 8.
03. In denying Gookin's motion to suppress evidence, the trial court erred in entering Conclusions of Law 3, 3 (sic), 4, 5, 6, 7, 8, 10 and 11 as fully set forth herein at pages 4-5.
04. The trial court erred in failing to suppress evidence seized as a result of the warrantless search of Yoder's vehicle incident to his arrest where the State failed to prove that he was in close physical proximity to the vehicle at the time of the search.
05. The trial court erred in failing to suppress evidence obtained through the exploitation of an unlawful seizure.
06. The trial court erred in permitting Gookin to be represented by counsel who provided ineffective assistance by failing to properly move to suppress evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the warrantless search of the vehicle incident to the driver's arrest for driving while license suspended, which served as the sole justification for Deputy Simper's interaction with Gookin for the purpose

of searching the vehicle, was unconstitutional?
[Assignments of Error Nos. 1-3].

02. Whether the warrantless search of the vehicle incident to the driver's arrest for driving while license suspended, which served as the sole justification for Deputy Simper's interaction with Gookin for the purpose of searching the vehicle, can be justified where the State failed to prove that the driver was in close physical proximity to the vehicle at the time of the search. [Assignments of Error Nos. 1-4].
03. Whether the detention and pat-down search of Gookin for weapons was illegal where Deputy Simper was unable to point to specific, articulable facts giving rise to an objectively reasonable belief that Gookin could be armed and dangerous? [Assignments of Error Nos. 1-5].
04. Whether the trial court erred in permitting Gookin to be represented by counsel who provided ineffective assistance by failing to properly move to suppress evidence? [Assignment of Error No. 6].

C. STATEMENT OF THE CASE

01. Procedural Facts

Erica N. Gookin (Gookin) was charged by information filed in Thurston County Superior Court on October 9, 2008, with unlawful possession of heroin, contrary to RCW 69.50.4013(1). [CP 3].

The court denied Gookin's pretrial motion to suppress evidence under CrR 3.6 and entered the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This court has jurisdiction over the parties and subject matter;
2. That on October 16, 2008 the deputy initiated a lawful traffic stop on a vehicle with expired license tabs;
3. That the deputy made a lawful arrest of the driver for DWLS 3rd Degree;
4. That the driver was Ezra Yoder, known by law enforcement as hostile towards law enforcement;
5. That Yoder was handcuffed and put in the back seat of the patrol vehicle;
6. That the deputy contacted passenger (ERICA GOOKIN) and asked her to exit the vehicle for a search incident to arrest;
7. That the deputy was working without a partner and alone at the stop.
8. That officer would be in a vulnerable position while searching the vehicle.
9. That GOOKIN exited the vehicle wearing an oversized bulky coat with large pockets;
10. That GOOKIN had her hands in her pockets;
11. That GOOKIN removed her hands from her pockets when asked to do so;
12. That the deputy asked GOOKIN if she would consent to a pat-down search for weapons;
13. That GOOKIN agreed to the pat-down search;

14. That the deputy was acting in a professional manner;
15. That GOOKIN appeared calm and relaxed;
16. That the deputy patted down the outside of GOOKIN's coat;
17. That felt (sic) hypodermic needles in the coat pocket;
18. That the deputy immediately recognized the bulky substance to be hypodermic needles;
19. That the deputy stopped searching once he immediately recognized the hypodermic needles;
20. That the deputy asked GOOKIN if those were hypodermic needles;
21. That GOOKIN admitted that she had hypodermic needles;
22. That the deputy asked if the needles were capped;
23. That GOOKIN admitted that one of the needles was used and they were capped;
24. That GOOKIN pulled from her pocket a clear plastic bag containing several hypodermic needles, some containing substance, after the deputy asked her to remove them from her pocket;
25. That inside the plastic bag, the deputy recognized a ball of black sticky substance that he later field tested positive for heroin.

Having so found, the Court enters the following:

II. CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties and subject matter;
2. The traffic stop and arrest were lawful;
3. That the search of the vehicle incident to arrest was lawful;
3. (sic) That the deputy had objective

- rationale to search GOOKIN for officer safety;
4. That GOOKIN consented to the search;
 5. That had she not consented, and (sic) alternative to the consent search, the deputy was justified in the pat-down as he had sufficient facts based on objective rationale to reasonably believe the person was armed and presently dangerous to conduct a pat-down search for weapons;
 6. That the actions of the deputy were not arbitrary or harassing;
 7. That The deputy had probable cause to believe the items in the coat were hypodermic needles after immediately recognizing them as such;
 8. That the hypodermic needles may be used as weapons due to their sharp needles, or contain potentially harmful substance, or human bacteria;
 9. That hypodermic needles constitute contraband;
 10. That he officer was alone and vulnerable to attack while searching the vehicle;
 11. That the evidence found during the pat-down is admissible.

[CP 21-23].

Following a stipulated facts trial, Gookin was found guilty as charged. [CP 20]. She was sentenced within her standard range and timely notice of this appeal followed. [CP 24-32].

02. Substantive Facts: CrR 3.6 Hearing

On October 6, 2008, at approximately 2:10 in the afternoon, Deputy Cameron Simper conducted a routine traffic stop that

resulted in the arrest of the driver for driving with a suspended license. [RP 02/23/09 8-9]. Before searching the vehicle incident to this arrest, Simper handcuffed the driver and secured him in the back of his patrol car. [RP 02/23/09 17, 19]. He then told the passenger, Gookin, to exit the car, which she did. [RP 02/23/09 11].

Once outside the car, Gookin first removed her hands from the front pockets of her oversized “puffy coat” (“a winter-type jacket”) at Simper’s request before agreeing to Simper’s additional request to pat her down for his “safety prior to conducting a search of the vehicle.” [RP 02/23/09 10, 17, 19].

I was by myself, her hands were in her pockets, and being that I was going to be conducting a search of the vehicle incident to the driver’s arrest I would, therefore, be in a vulnerable position and I wanted to make sure that any passengers in that vehicle didn’t have any weapons prior to my search.

[RP 02/23/09 13].

During the pat down, Simper felt what he believed to be hypodermic needles. [RP 02/23/09 11]. When asked, Gookin confirmed this and then, at Simper’s request, removed a plastic bag from her pocket that contained several needles and a “dark ball of substance” that “(t)ested positive as in opium alkaloid.” [[RP 02/23/09 12-13].

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D. ARGUMENT

01. THE WARRANTLESS SEARCH OF THE VEHICLE INCIDENT TO THE DRIVER'S ARREST FOR DRIVING WHILE LICENSE SUSPENDED, WHICH SERVED AS THE SOLE JUSTIFICATION FOR DEPUTY SIMPER'S INTERACTION WITH GOOKIN FOR THE PURPOSE OF SEARCHING THE VEHICLE, WAS UNCONSTITUTIONAL UNDER ARIZONA V. GANT.

01.1 Overview of Law

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, and art. I, § 7 of the Washington Constitution, provide that warrantless searches are per se illegal unless they come within one of the few, narrow exceptions to the warrant requirement. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). Under both constitutional provisions, the State bears the burden of proving that a warrantless search is valid under a recognized exception to the warrant requirement. State v. Parker, 139 Wn.2d at 496.

01.2 Arizona v. Gant Controls

Until recently, it was generally understood that a warrantless search of a vehicle incident to a recent occupant's arrest was permissible under New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1991), even if the person arrested was handcuffed and secured in a police car at the time of the search. See, e.g., State v.

Stroud, 106 Wn.2d 144, 152, 720 P.2d 436 (1986); State v. Rathbun, 124 Wn. App. 372, 376-80, 101 P.3d 119 (2004); United States v. Mapp, 476 F.3d 1012, 1017-19 (D.C. Cir.), cert. denied, ___ U.S. ___, 127 S. Ct. 3031 (2007); United States v. Hrasky, 453 F.3d 1099, 1102 (8th Cir. 2006), cert. denied, 550 U.S. 903 (2008). In Stroud, the Washington Supreme Court limited the scope of Belton to unlocked containers because of the greater protection granted Washington citizens under Article I, §7 of our state constitution. Stroud, 106 Wn.2d at 152.

On April 21, the U.S. Supreme Court reversed the broad reading of the above longstanding bright-line rule in Arizona v. Gant, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), (2009), a case in which Gant's vehicle had been searched incident to his arrest after he had been handcuffed and placed in the back of a patrol car. Gant, 129 S. Ct, at 1715. In affirming the lower court's opinion that the seizure of the cocaine and other items in the vehicle was the result of an unreasonable search within the meaning of the Fourth Amendment, the court reasoned:

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of the arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Gant, 129 S. Ct. at 1723-24.

This holding applies and compels reversal and dismissal of Gookin's conviction for possession of heroin. Yoder, the driver of the vehicle in which Gookin was the sole passenger, was handcuffed and secured in the back of Deputy Simper's patrol vehicle at the time Simper began to search the vehicle incident to Yoder's arrest for driving while license suspended. Under the facts of this case, absent this justification for the warrantless search of the vehicle, which Gant mandates, Simper was without justification to interact with Gookin for the purpose of searching the vehicle and his directions to her in that regard. Given that the state constitution cannot be less restrictive than the federal constitution, Des Moines Marina Ass'n. v. City of Des Moines, 124 Wn. App. 282, 296, 100 P.3d 310 (2004), Gant controls. Where a higher court enters a constitutional ruling in a criminal case, that ruling applies to all cases on direct review. Griffith v. Kentucky, 479 U.S. 314, 107 S. Ct. 708, 93 l. Ed. 2d 649 (1987); State v. McCormack, 117 Wn.2d 141, 812 P.2d 483 (1991), cert. denied, 502 U.S. 1111 (1992); State v. Blanks, 139 Wn. App. 543, 161 P.3d 455 (2007), review denied, 163 Wn.2d 1046 (2008). The reasons for this are clear: "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of

constitutional adjudication,” taints the “integrity of judicial review” and would result in “actual inequity.” Griffith, 479 U.S. at 322-323. As a result, there is “no exception for cases in which the new rule constitutes a clear break from the past.” In re Personal Restraint of St. Pierre, 118 Wn.2d 321, 326-27, 823 P.2d 492 (1992). Nor will concerns of “reliance” by the State justify departing from the rule. See State v. Hanson, 151 Wn.2d 783, 789-91, 91 P.3d 888 (2004).

Further, the ruling of Gant applies regardless whether the defendant moved to suppress and argued the search was illegal below. State v. Rodriguez, 65 Wn. App. 409, 417, 828 P.2d 636, review denied, 119 Wn.2d 1019 (1992). There can be no “waiver” of the right to raise the issue because, at the time of trial, the parties would have reasonably relied on the then-current understanding of what Belton held and would have assumed the search was lawful under that case. See Rodriguez, 65 Wn. App. at 417. This issue is of constitutional magnitude and manifest and may be raised for the first time on appeal under RAP 2.5(a)(3). Id.

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02. THE WARRANTLESS SEARCH OF THE VEHICLE INCIDENT TO THE DRIVER'S ARREST FOR DRIVING WHILE LICENSE SUSPENDED, WHICH SERVED AS THE SOLE JUSTIFICATION FOR DEPUTY SIMPER'S INTERACTION WITH GOOKIN FOR THE PURPOSE OF SEARCHING THE VEHICLE, CANNOT BE JUSTIFIED WHERE THE STATE FAILED TO PROVE THAT THE DRIVER WAS IN CLOSE PHYSICAL PROXIMITY TO THE VEHICLE AT THE TIME OF THE SEARCH.

Art. I, § 7 “of the state constitution prohibits warrantless searches of vehicles incident to arrest where the suspect is not physically proximate to the vehicle at the time of arrest.” State v. Webb, 147 Wn. App. 264, 195 P.3d 550 (2008) (citing State v. Adams, 146 Wn. App. 595, 191 P.3d 93 (2008). There must be “a close physical and temporal proximity between the arrest and the search.” State v. Fore, 339 Wn. App. 347, 783 P.2d 626 (1989), review denied, 114 Wn.2d 1011 (1990).

In State v. Adams, Division I of this court upheld a vehicle search based on the defendant's proximity to the vehicle where “(h)e was never more than four or five feet from his car, and was at all times closer to it than was the deputy. He could have reached it in a couple steps.” 146 Wn. App. at 605 (footnote omitted). In contrast, the same division, in State v. Webb, reversed the denial of the defendant's suppression motion

where the evidence demonstrated that the defendant had been arrested and then placed in a patrol car nearby prior to the search of his vehicle incident to his arrest:

In sum, the record is devoid of evidence showing that the search of Webb's car falls within the narrowly drawn search incident to arrest exception as required by article I, section 7. The State has failed to carry its burden to show a valid exception to the warrant requirement for searches of the passenger compartment of a vehicle incident to arrest. Reversal of the suppression order is required.

State v. Webb, 147 Wn. App. 274.

Unlike Adams, here no evidence was presented nor could have been presented placing Yoder in close proximity to his car at the time of the search of the vehicle. Similar to Webb, however, prior to the search, Yoder had been removed from the car, taken into custody and handcuffed. Again, as held in Gant, the "(p)olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search...." Arizona v. Gant, 129 S. Ct. at 1723-24. Where this is not the case, as here, a search of the arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies, with the result that Simper was without justification to interact with Gookin for the purpose of searching the vehicle and his directions to her in that regard,

and any evidence seized or obtained through the exploitation of this illegality is tainted and therefore inadmissible as “fruits of the poisonous tree.” Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); State v. Soto-Garcia, 68 Wn. App. 20, 27-29, 841 P.2d 1271 (1992).

03. THE DETENTION AND PAT-DOWN SEARCH OF GOOKIN FOR WEAPONS WAS ILLEGAL WHERE DEPUTY SIMPER WAS UNABLE TO POINT TO SPECIFIC, ARTICULABLE FACTS GIVING RISE TO AN OBJECTIVELY REASONABLE BELIEF THAT GOOKIN COULD BE ARMED AND DANGEROUS.

A person is seized under art. I, § 7 of the Washington Constitution when his or her freedom is restrained and a reasonable person would think he or she is not free to terminate the encounter and leave or decline a request due to an officer’s use of force or display of authority. State v. O’Neil, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). The standard is “a purely objective one, looking to the actions of the law enforcement officer.” Id. While it is less intrusive than an arrest, an investigative stop is a seizure and must therefore be reasonable under the Fourth Amendment and article I, § 7 of the Washington Constitution. State v. Thierry, 60 Wn. App. 445, 447, 803 P.2d 844 (1991) (citing State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986)). “(I)t is elementary

that all investigatory detentions constitute a seizure.” State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004) (police officer not permitted to request identification from passenger unless independent basis supports request). If the initial stop is unlawful, the following search and its results are inadmissible as “fruits of the poisonous tree.” Kennedy, 107 Wn.2d at 4 (quoting Wong Sun v. United States, *supra*).

Under Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968) and State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982), a police officer, in addition to questioning, may engage in a self-protective search of a person detained for questioning if the officer has reasonable grounds to believe that the person is armed and presently dangerous. State v. Hobart, 94 Wn.2d 437, 441, 617 P.2d 429 (1980). The officer ‘must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous.’ State v. Galbert, 70 Wn. App. 721, 725, 855 P.2d 310 (1993) (quoting Sibron v. New York, 392 U.S. 40, 64, 20 L. Ed. 2d 917, 88 S. Ct. 1889 (1968)).

“A ‘generalized suspicion’ is insufficient to justify a frisk”, State v. Sweet, 44 Wn. App. 226, 234, 721 P.2d 560, review denied, 107 Wn.2d 1001 (1986), even when a person is present at a location the police are authorized to search by a valid warrant. Ybarra v. Illinois, 444 U.S. 85, 92-94, 62 L. Ed. 2d 238, 100 S. Ct. 338 (1979); State v. Broadnax, 98 Wn.2d at 295.

State v. Galbert, 70 Wn. App. at 725.

Once an officer restrains an individual's freedom to leave, he or she has effected a seizure, State v. Richardson, 64 Wn. App. 693, 696, 825 P.2d 754 (1992), and a simple encounter between an officer and an individual can mature into an unlawful seizure depending on the circumstances. In State v. Gleason, 70 Wn. App. 13, 851 P.2d 731 (1993), a police officer approached a suspect and called out, "[C]an I talk to you a minute?" Gleason, 70 Wn. App. at 17. When the suspect turned around, the officer was "within arm's length in front of him," and "asked him why he was there and demanded identification." Id. As the defendant produced his driver's license, the officer spotted a suspected bundle of cocaine in the suspect's hand, grabbed the suspect by the shirt, grabbed his hand, and pulled out the bundle. The court held that a seizure occurred prior to the police officer's spotting of the suspected cocaine in the defendant's hand, i.e., at the time the officer asked the suspect why he was there and demanded he identify himself. The court reasoned that under these circumstances a reasonable person in Gleason's position would think he or she was not free to terminate the encounter and leave. Gleason, 70 Wn. App. at 17.

In State v. Henry, 80 Wn. App. 544, 910 P.2d 1290 (1995), where the defendant was justifiably stopped for committing two traffic

infractions, the officer questioned Henry as to whether his vehicle had been used in recent burglaries or drug transactions, and when Henry said no, the officer requested permission to search the car. Henry consented and got out of the car. The officer testified that Henry “looked real nervous. He was looking down at the floorboard like – I don’t know what he was looking for, but it made me nervous. As a matter of fact even the hairs started to stand on the back of my head because I was kind of concerned.” Henry, 80 Wn. App. at 546. The officer said he asked if he could search Henry’s person “for officer safety purposes.” Henry, 80 Wn. App. at 547. In reversing the trial court’s order denying suppression of the evidence, the appellate court noted that most persons stopped by law enforcement officers display some signs of nervousness, and although the officer testified that Henry was more nervous than normal, the officer had converted a routine traffic stop into a more intrusive detention for which he had no objective basis. Henry, 80 Wn. App. at 552.

Deputy Simper instructed Gookin to exit the vehicle because he believed she posed an independent threat to his safety. His interaction with her was thus investigatory and, as such, “was subject to the stop-and-frisk standards set for in Terry and embraced in Washington case law as a test consistent with the constitutional guarantee of article I, section 7.” State v. Horrace, 144 Wn.2d 386, 394, 28 P.3d 753 (2001). Simper

detained Gookin because he was concerned she might have a hidden weapon.

I was by myself, her hands were in her pockets, and beings that I was going to be conducting a search of the vehicle incident to the driver's arrest I would, therefore, be in a vulnerable position and I wanted to make sure that any passengers in that vehicle didn't have any weapons prior to my search.

[RP 02/23/09 13].

Simper's request to search Gookin was simultaneous with her detention; there were no significant events that intervened between the detention and the consent. Simper did not administer Miranda,¹ warnings to Gookin at the time. Under these facts, Gookin's consent did not justify the extended detention. See State v. Henry, 80 Wn. App. at 551. What is more, "evidence obtained by the purported consent should be held admissible only if it is determined that the consent was both voluntary and not the exploitation of the prior illegality." 3 Wayne R. LaFave, Search and Seizure § 8.2(d), at 656 (3d. ed. 1996). Should this court determine that Gookin consented to Simper's request to search her, given that her initial detention was illegal, any consent she may have subsequently given to the search was vitiated by the illegal detention. State v. Armenta, 134

¹ Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966)

Wn.2d 1, 15-18, 948 P.2d 1280 (1997) (consent given pursuant to an unlawful detention is not voluntary as a matter of law); State v. Soto-Garcia, 69 Wn. App. at 27 (consent “obtained through exploitation of a prior illegality may be invalid even if voluntarily given”); State v. Rankin, 151 Wn.2d at 695 (impermissible for officer to even request identification from passenger unless independent basis supports request).

Deputy Simper never stated why he believed Gookin was armed and presently dangerous. And while Gookin initially did have her hands in the front pockets of her “winter-type” jacket, she immediately removed them upon exiting the vehicle at Simper’s request. [RP 02/23/09 17]. And the fact that the deputy was alone and about to search the vehicle at about 2:00 in the afternoon, does not weigh in on this issue. Simper failed to articulate any action by Gookin that made him suspect that she was armed and dangerous. The invasion of Gookin’s privacy was clear and Simper’s vulnerability rationale weak, for it, as here, would lead to overbroad searches in every case where an officer acting alone initiates a search of a vehicle occupied by a passenger suspected on no wrong doing. Those who want to search cannot themselves decide whether the reason is justified.

Simper did not have an objectively reasonable belief that Gookin was armed and dangerous. Thus the search was not justified based on

officer safety concerns, with the result that the discovery of heroin on Gookin's person should have been suppressed as fruit of the illegal search. State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999) (“When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.”).

04. GOOKIN WAS PREJUDICED AS A RESULT OF HER COUNSEL'S FAILURE TO PROPERLY MOVE TO SUPPRESS EVIDENCE.²

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not

² While it is submitted that this issue may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree.

required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Should this court find that trial counsel waived the errors claimed and argued in the preceding sections of this brief by failing to move to suppress evidence for exactly the same reasons, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to move to suppress the evidence in the same manner, and if counsel had done so, the motion would have been granted under the law set forth in the preceding section of this brief.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident: but for counsel's failure to move to suppress the evidence in the same manner, there would have been insufficient evidence to convict Gookin of the charged offense.

Counsel's performance was deficient because he failed to move to suppress the evidence on the grounds argued herein, which was highly prejudicial to Gookin, with the result that she was deprived of her constitutional right to effective assistance of counsel, and is entitled to reversal of her conviction.

E. CONCLUSION

Based on the above, Gookin respectfully requests this court to reverse and dismiss her conviction consistent with the arguments presented herein.

DATED this 14th day of September 2009.

Thomas E. Doyle
THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

Carol La Verne
Deputy Pros Atty
2000 Lakeridge Drive S.W.
Olympia, WA 98502

Erica N. Gookin

DATED this 14th day of September 2009.

Thomas E. Doyle
Thomas E. Doyle
Attorney for Appellant
WSBA No. 10634

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IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 ERICA N. GOOKIN,)
)
 Appellant.)
)
 _____)

Court of Appeals No. 38971-1-II
CERTIFICATE OF SERVICE

CERTIFICATE

I certify that I mailed a copy of the Brief of Appellant by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

Erica N. Gookin
9010 Rose Road
Lakewood, WA 98498

DATED this 15th day of September 2009.

Thomas E. Doyle
Thomas E. Doyle
Attorney for Appellant, WSBA 10634